No. 14774

United States
COURT OF APPEALS
for the Ninth Circuit

ALBERT STAIN,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S BRIEF

Appeal from Judgment of Conviction by the United States District Court for the District of Oregon.

G. BERNHARD FEDDE,
1108 S. E. Grand Avenue,
Portland, Oregon,
Counsel for Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-55

SUBJECT INDEX

TABLE OF CASES

MISCELLANEOUS CITATIONS

No. 14774

United States
COURT OF APPEALS
for the Ninth Circuit

ALBERT STAIN,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S BRIEF

Appeal from Judgment of Conviction by the United States District Court for the District of Oregon.

NATURE OF THE CASE

This is a criminal appeal from a conviction for refusal to submit to induction into the armed forces of the United States contrary to an order of a draft board.

STATEMENT OF CASE

Although Albert Stain, the appellant, was born in Salem, Oregon, in 1928, most of his life was spent in

Canada, and all of his schooling was obtained in a rural schoolhouse when weather permitted (Tr. 19). The family moved to Saskatchewan about 1934, and he finished the seventh grade there after a fashion. Except for one or two brief visits to the United States, during one of which in 1946 he registered for the draft, he lived continuously in Canada until about 1948 (Tr. 19, and Ex. No. 1). At that time he came back to Salem, Oregon, and his cousin, Calvin Wildt, who had been in the navy, told him in 1949 that he had to register again for the draft and fill out a Classification Questionnaire (Tr. 19-20, 22, 26). This cousin did not advise the appellant to sign Series XIV as a Conscientious Objector, but after looking over the questionnaire told the appellant, "That is all you have to fill out". (Tr. 26). An examination of the questionnaire (Form 100 in Ex. No. 1) will show that despite the help of his cousin it is full of errors, corrections, misspellings (Marion County being "Marrion"), even to giving the wrong date of birth (1927, instead of the correct 1928), and concludes with the significant statement:

> "I have assisted the registrant herein named in preparation of this questionnaire because *he did not understand it*.
>
> /s/ CALVIN WILDT"

This failure to understand and grasp the meaning of words and what was happening has dogged the appellant throughout the ensuing encounter with Selective Service (Tr. 20-23, 27). Where he was unaided (as in the physical examination) he bungled matters. Not until he took his physical examination on September 6, 1950 did any-

one advise him that there was such a thing as a conscientious objector classification or a special form to fill out (Tr. 25). And he promptly asked for that form (Form 150) and filled it out within the required time with the help of a Mrs. Nettleton, "a lady with the Quakers" (Tr. 20). The answers are his own, as both their form and spelling would indicate. Everything he filed showed every earmark of lack of understanding, and, although it was apparent on his Form 150 that his belief in God forbade his participation in war through any form of military service, much of several answers was only slightly relevant (Tr. 37-38).

On September 14, 1950 (the minute entry says "9-19-50"), at appellant's request the local board issued officially to him by hand a Form 150 (Special Form for Conscientious Objectors), which he duly returned on September 20, 1950, according to the receipt stamped on the face thereof. This form among other things stated that:

> "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training or service in the armed forces. I, therefore, claim exemption from combatant training and service and, if my claim is sustained, I understand that I will, because of my conscientious objection to noncombatant service in the armed forces, be deferred as provided in Section 6 (j) of the Selective Service Act of 1948.
>
> /s/ ALBERT STAIN"

"I beleave (sic) in Almighty God."

"Thou shall (sic) not kill."

"From my childhood my parents have taught me the Bibel, I beleave it myself and also read the Bibel and try and falow what it says". (Sic)

"I was brought up in a Christian home * * *"

"Do unto others as I want others to do unto me."

Granted that this sums up to an unlettered and inarticulate presentation of a conscientious objector position, nevertheless the local board did not question his veracity but chose to ignore all that he presented and allegedly refused to reopen his case on the ground that he had been "given a physical examination and found acceptable without protest" (Tr. 43). This statement, although placed surreptitiously in his file and dated September 26, 1950, was never sent to the appellant; neither was any letter to that effect nor any notice of classification or continuance in his present classification sent to him, nor was any minute of the action entered on appellant's cover sheet (Tr. 34). In fact, after filing his request for classification as a conscientious objector the appellant heard nothing until receiving his Notice to Report for Induction, mailed October 3, 1950 (Tr. 34). He was given no opportunity to present his explanation of any questions the board might have had if it had read his Form 150 at all. He was deprived of the right to appear personally before the local board. He was deprived of the right of appeal.

Inarticulate and shy, the appellant went along with such irregular procedures unwittingly and reported for induction on October 18, 1950 as directed. When asked to take the step forward symbolic of entering military

service, he refused. His file indicates that he thereupon at the induction center wrote out a further explanation of his belief, as follows:

> "I refuse to be inducted into the Armed Services of the United States."
>
> "I beleave in God, and it says in my Bibel thou shalt not Kill. it says love thy God with all thy hart, and all thy soul, and all thy mined Jeseus says if my Kingdom were of this world then would my servents fight, But now my Kingdom is not of this world. (sic)
>
> "It says in my Bibel who shall take'th the sword shall die with the sword (sic)
>
> /s/ ALBERT STAIN"
>
> (Ex. No. 1)

Here, unaided by anyone, the appellant set forth his belief in God, his reliance on the Holy Scriptures as the source of his motivation, and his conviction that military service conflicted with his religious faith. This, written on October 18, 1950, four weeks after filing his Form 150 indicates further what the local board would have learned if it had studied that form and called him in for questioning. But the local board had chosen to ignore the new facts in his file. His case was sent up to Portland for presentation to the Grand Jury. Indictment (Tr. 3-5) was returned on April 11, 1951.

While this indictment was pending, Selective Service caused a neuro-psychiatric evaluation to be made by a contract psychiatrist, Herman A. Dickel, M.D., and his report of April 23, 1952 to Selective Service includes the following comment:

> "It is my opinion at the present time that this 23 year old, single, white American male falls into the category of the *mildly inadequate,* somewhat emotionally unstable group of individuals who might possibly break down under severe enough stress and strain, so that he would develop an actual psychotic illness. This opinion is based chiefly upon the history of mild deviations in behavior in the past, his present trends and *limited ability,* and the general lack of normal emotional response. * * *
>
> "I am recommending, therefore, from a psychiatric point of view that everything be done to persuade this chap to enter service on a voluntary basis and to go into *noncombat* type. * * * "
>
> (Ex. No. 1) (Italics supplied)

It should be noted that this report described a young man nearly two years older than when he filed his Form 150; yet despite the passage of time he was still mildly inadequate and of limited ability. These factors, plus his lack of schooling, explain the sketchiness in his presentation of his claim as a conscientious objector.

The appellant pleaded "Not Guilty" and stood trial on October 2, 1954. The motion for judgment of acquittal was denied. He was found "Guilty" and sentenced on April 20, 1955 to six months' imprisonment.

The appellant has appealed that Judgment to this Court.

SUMMARY OF ARGUMENT

In view of the fact that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections and there is no question of

veracity presented, the problem to be determined here by this Court is one of law rather than one of fact.

It is respectfully submitted, then, that the conviction of Albert Stain must be set aside for the following reasons:

1) The filing of the Form 150 (Special Form for Conscientious Objectors) made a prima facie case justifying a change in classification to I-O, and the failure of the local board to consider the form at all on its merits was so arbitrary, capricious and contrary to law as to render the subsequent Order to Report for Induction and the indictment based thereon null and void.

2) The failure of the local board to build a record of affirmative substantial evidence of misrepresentation or any rebuttal at all rendered its denial of the conscientious objector status without basis in fact, and therefore arbitrary, capricious and contrary to law. All the evidence in the Selective Service file is unequivocal that he could not properly be continued in I-A.

3) On the procedural side, (a) the refusal of the local board to reopen and meet his prima facie case and their citing irrelevant grounds, (b) the failure to write the appellant a letter stating its decision, (c) the failure of the local board to take any affirmative action continuing him in his earlier I-A classification or placing him in any other classification, and (d) the subsequent falure to make any entry on the back of the Form 100 of its decision,—these each left the record in such improper shape as to deprive the appellant of notice and a right to a personal appearance before the local board,

and of a right to an appeal to the state appeal board; and such deprivation constituted a material violation of due process of law so as to render the Order to Report for Induction and the indictment based thereon null and void.

ARGUMENT

I.

APPELLANT MADE PRIMA FACIE CASE

The filing of the Form 150 (Special Form for Conscientious Objectors) by the appellant made a prima facie case justifying a change in classification to I-O, and the failure of the local board to consider the form on its merits at all was so arbitrary, capricious and contrary to law as to render the subsequent Order to Report for Induction and the indictment based thereon null and void.

The rights of conscientious objectors stem from the Act of Congress which provides (Selective Service Act of 1948, 50 USCA App. Sec. 456 (j)) in part:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. * * * Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be *entitled to an appeal* to the appropriate appeal board. * * *" (Italics supplied)

In seeking to comply with the letter and spirit of the law, regulations were promulgated by Selective Service (32 C.F.R. 1625.2) which provide in part:

> "The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, * * * if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; * * * provided, * * * the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * * ".

Since the induction order had not been sent when the appellant filed his Form 150, there is no doubt that his form was timely; nor does the Government urge otherwise. Nor did the draft board raise any objection on this score at any time either before or after officially issuing the form.

The Form 150 was in writing, signed by the appellant, and set forth the following facts not considered when he was classified earlier:

1) That he was by reason of his religious training and belief, conscientiously opposed to participation in war in any form and that he was further conscientiously opposed to participation in noncombatant training or service in the armed forces.
2) That he believed in a Supreme Being, i.e., Almighty God.
3) That he had been taught the Bible from childhood, and had been brought up in a Christian home.
4) That his parents were members of the Assembly of God.
5) That his belief in God included the injunction not to kill, and the Golden Rule.
6) That he therefore claimed exemption from combatant training and service as well as noncombatant service in the armed forces.

Furthermore, his opposition to military service is not based on sociological, political or philosophical beliefs, but is grounded in an immovable belief in a Supreme Being. This belief is supported by the direct Word of God, the Bible. It is not a limited objection that he has. He is not willing to join the army as a noncombatant soldier or go in as a conscientious objector only to actual combat service. He objects to doing anything in the armed forces. He will not be a soldier.

If true, these facts would have justified a change in the appellant's classification. It was completely new information to the local board, and it was presented by the appellant promptly after he had been advised that his position should be set forth on a Form 150.

But, whereas the board had done its duty in issuing and receiving the form, it failed wholly to do its duty under the law and regulations when it failed to consider it on its merits at all. After the appellant had presented his facts, the local board could not lawfully refuse to weigh the evidence.

It is well established law that a classification which is arbitrary, based upon tests at variance with the statute or having no basis in fact, is beyond the jurisdiction of Selective Service and illegal and cannot result in conviction for refusal to obey a notice to report for induction.

Dickinson v. United States, 346 U.S. 389, 98 L. Ed. 132, 74 S. Ct. 152 (1953).

Estep v. United States, 327 U.S. 114, 90 L. Ed. 567, 66 S. Ct. 423 (1946).

The *Estep* case, the leading case on the scope of judicial review of a draft board decision under World War II legislation similar to the statute here involved, held that the question of the local board's jurisdiction was reached "if there is no basis in fact for the classification which it gave the registrant." See Shipley on "Selective Service: Finality of Draft Board Decisions", in 41 American Bar Association Journal, 709, at 711 (August 1955).

In the *Dickinson* case the Court held that the local board was not free to disbelieve a registrant's testimonial and documentary evidence as to his sincerity in the absence of any impeaching or contradictory evidence. The Court said:

> "But when the uncontroverted evidence supporting registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice. * * * "

Whereas in the *Dickinson* case the board went so far as to suspect and speculate, in the appellant's case the board did not observe his sincerity or demeanor or even consider the facts, but brushed them off with an irrelevant and untrue comment that since he had been "given a physical examination and found acceptable *without protest,* his record cannot be reopened" (Tr. 43). (Italics supplied.) Note that it was at his physical examination he made his protest known against military service and learned of the Form 150 (Tr. 25).

The recent case of *Rempel v. United States* (CA 10, 1955), 220 F. 2d 949, at 951, has stated the rule lucidly, as follows:

> "It is equally well settled that where a registrant makes a prima facie showing that he is conscientiously opposed to participation in war in any form, the rejection of his claim for exemption cannot stand as an undergirding support for a prosecution of this kind *unless there be in his registration file some showing of a countervailing nature* which tends to justify a finding on the part of the classification board *that the claim is not made in good faith.* * * *" (Italics supplied)

There is nothing in the case at bar to indicate that the appellant's claim was not made in good faith.

It follows, necessarily, under the cases cited, that the action of the local board in not considering his Form 150 and in subsequently issuing the order to report for induction are illegal, beyond the jurisdiction of the board, and cannot be made the grounds for a criminal conviction.

II.

ACTION OF BOARD WITHOUT BASIS IN FACT

The failure of the local board to build a record of affirmative substantial evidence of misrepresentation or any rebuttal at all rendered its denial of the conscientious objector status without basis in fact, and therefore arbitrary, capricious and contrary to law.

The Special Form for Conscientious Objectors (Form 150) which the appellant was given with the consent of the local board (Tr. 34) and which was filled out and filed within the time specified thereon by the clerk of

the local board, made a prima facie case for reopening and reclassification as a conscientious objector.

This Court of Appeals in *Schuman v. United States* (CA 9, 1953), 208 F. 2d 801, was faced with a similar case and said:

> "In view of the statutory language of 50 U.S.C. App. Sec. 456 (j), the denial of the exemption as a conscientious objector amounted to a finding that Schuman was not, 'by reason of religious training and belief * * * conscientiously opposed to participation in war in any form.' Yet Schuman's statements as to his religious beliefs are uncontradicted, and one of the two members of the local board who were present at the hearing stated to Schuman, 'Your veracity of your faith is unquestionable.' We cannot find in the proceedings before the local board any affirmative evidence which controverts Schuman's claim. There are only the suspicions raised by the fact that Schuman did not begin his religious studies until after he had registered for the draft and by the fact that he had not sought exemption until after the Korean War broke out. As the Supreme Court has stated, 'When the uncontroverted evidence supporting a registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice.' *Dickinson v. United States,* * * *.
>
> "The judgment of the district court is reversed and the cause is remanded with instructions to dismiss."

And again in *Ashauer v. United States* (CA 9, 1954), 217 F. 2d 788, the Ninth Circuit held:

> "* * * Searching the entire record, as is our duty, we find therein no evidence of whatever nature which is incompatible with the claim of exemption

> and we must hold, accordingly, that appellant's classification as I-A was without basis in fact. * * *"

In the case at bar, after having made his claim for exemption no question was raised at any stage of the administrative proceeding as to the appellant's sincerity or good faith. Except for what was in his file, the local board had no other basis for its determination, because it never saw the appellant so as to form an impression of his demeanor. The record is barren of anything impugning his veracity.

Parenthetically, the appellant's appearance four years later at his trial still was that of a sincere and shy person seeking not an escape from service but only to present the claims of his conscience. His inadequate education in rural Canada and inability to understand and express himself did not minimize his sincerity, but served rather to explain why he had been so inarticulate on his forms.

In *United States v. Vincelli* (CA 2, 1954), 216 F. 2d 681, wherein the registrant had filed a letter "appealing" his I-A classification and the board later sent him a Form 150 which he returned in time, the board refused to reopen the case; but the Court of Appeals said:

> "Though the language in the regulation (32 C.F.R. Sec. 1625.2) is permissive merely that does not mean that a local board may refuse to reopen arbitrarily, but requires it to exercise *sound discretion.* That, in turn, requires, when the basis of an application is not clearly frivolous, an inquiry designed to test the asserted facts sufficiently to give the board a *rational base* on which to put decision. * * *" (Italics supplied)

See also the discussion by Shipley, "Selective Service: Finality of Draft Board Decisions", 41 American Bar Association Journal 709, at 711 (August 1955).

Where, in the case at bar, is the finding of frivolity? Where is the exercise of sound discretion in ignoring appellant's Form 150? By what stretch of the imagination can the notation in the file dated September 26, 1950 (Tr. 43) be considered a rational base? Where has the draft board set forth any rebuttal or affirmative evidence of misrepresentation?

It follows relentlessly that an inquiry to test the appellant's assertions became imperative, and since the decision of the local board was without basis in fact, the I-A classification by the board after receiving the appellant's prima facie case became arbitrary, capricious and contrary to law, and the Order to Report for Induction based thereon is void.

III.

LOCAL BOARD PROCEDURE VIOLATED DUE PROCESS

On the procedural side, the errors and omissions of the local board left the record in such improper shape as to deprive the appellant to a right to a personal appearance before the local board, and of a right to an appeal to the state appeal board; and such deprivation constituted a material violation of due process of law so as to render the Order to Report for Induction and the indictment based thereon null and void.

The scope of review in Selective Service cases, as far as the classification is concerned, is limited and restricted. *Estep v. United States,* 327 U.S. 114, 90 L. Ed.

567, 66 S. Ct. 423 (1946). In cases where the review is restricted, there must be a strict compliance with the requirements of procedural due process by the administrative agency. *N.L.R.B. v. Cherry Cotton Mills* (CA 5, 1938), 98 F. 2d 444, at 446. For the final order to be valid the local board must strictly comply with the procedural requirements. *VerMehren v. Sirmyer* (CA 8, 1929), 36 F. 2d 876, at 881; *United States v. Zieber* (CA 3, 1947), 161 F. 2d 90, at 92; *Ex parte Fabiani* (E.D. Pa., 1952), 105 F. Supp. 139; *United States v. Graham* (N.D. N.Y., 1952), 108 F. Supp. 794; *Bejelis v. United States* (CA 6, 1953), 206 F. 2d 354.

In *Dismuke v. United States* (1936), 297 U.S. 167, at 172, 80 L. Ed. 1011, 56 S. Ct. 594, Mr. Justice Stone, speaking for the Court, commented:

> "* * * if he [the administrator] is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority * * * by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized, * * *. But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statutes creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled. * * *"

In *DeMoss v. United States* (CA 8, 1954), 218 F. 2d 119, which referred to Selective Service regulations, the Court said:

> "* * * courts are not to weigh the evidence to determine whether the classification made by the draft boards was justified. And 'justification' exists

> if the board's order is made in conformity with the regulations. * * * If the order is not so made, jurisdiction is wanting. * * *"

What do the law and the regulations require?

Congress in 50 U.S.C.A. App. Sec. 456 (j) provided that no religious conscientious objector could be compelled to undergo combatant training and service, and that if any local board did not sustain such claim for exemption such conscientious objector was "entitled to an appeal to the appropriate appeal board".

No regulation can be valid which derogates from the statute. Therefore, in order to ascertain the fact of conscientious objection and provide the machinery for appeal, 32 C.F.R. 1625.2 provides that "the local board may reopen and consider anew the classification * * * upon the written request of the registrant * * * if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification * * *". The Court in *United States v. Vincelli* (CA 2, 1954), 216 F. 2d 681, made it clear that a local board cannot refuse to reopen arbitrarily. No local board can set itself above the Act of Congress without violating due process.

A. *The local board erred in refusing to reopen appellant's classification and meet his prima facie case set forth in the Form 150.*

Faced with a prima facie case by filing a Form 150, the local board had no choice but to reopen and

consider anew appellant's classification. It makes a mockery of the legislative purpose to suggest that the conscientious objector issue, a *subjective* question, is disposed of by passing a *physical* examination. Hopefully we have progressed beyond trial by ordeal! But the board in this case assumed that a question of sincerity and belief could be settled by a stethoscope! In *United States v. Zieber* (CA 3, 1947), 161 F. 2d 90, the Court said:

> "If the Local Board did refuse to consider new or further information offered by Zieber and to include it in his cover sheet and to consider it in classifying him after it had been offered, or if the Local Board refused to receive new or further information which Zieber endeavored to offer to it, we think it is clear that he was denied due process of law. * * *"

The Seventh Circuit case of *United States v. Peebles* (CA 7, 1955), 220 F. 2d 114, involved a registrant who two years after registering and after having passed his pre-induction physical examination asked for his Form 150. Note, however, that in the *Peebles* case, although the board refused to reopen, it did correctly send to registrant a letter that "the additional evidence submitted did not warrant the reopening of your case." The Board also noted in the file that he had had an agricultural deferment and had not claimed the conscientious objector status until *after* passing the pre-induction physical examination, and therefore was entitled only to a I-A. But the National Selective Service saw the error, and as the case reports:

> "On April 16, 1953 General Hershey, National Director of the Selective Service System, wrote to the State Director in Indianapolis, pointing out that the *Local Board had failed to reopen* defendant's classification *after receiving SSS Form 150,* and requested that this be done. The State Director then notified the Local Board it would be necessary to consider anew defendant's classification and cancel the order for him to report for induction. * * *" (Italics supplied)

In the *Peebles* case the local board promptly classified him in I-A, then gave Peebles a hearing, classified him again in I-A, which was confirmed by the appeal board. On trial for the failure to submit to induction, the Seventh Circuit said:

> "Defendant, under due process, had a right to have the Board consider his evidence fairly and without prejudice. 'A draft board loses jurisdiction when it proceeds arbitrarily and without due regard to the rights to which a registrant is entitled under the regulations. * * *"

Can any less be said of the appellant where the local board refused to reopen his classification and consider his evidence of sincerity and faith set forth in the Form 150? It is submitted that the procedure required in the *Peebles* case on the filing of the Form 150 should also have been required in the case at bar.

The permissive language of the regulations, "may reopen", requires the use of sound discretion and a test of the asserted facts before a local board can be said to have a rational base for its decision. Since this was wholly lacking in the case at bar, it follows that the local board erred; the way was blocked for a hearing

before the local board, and an appeal (as guaranteed by the Act of Congress) was thwarted; and any subsequent order by the local board became void for want of jurisdiction.

B. *The local board erred in failing to write the appellant a letter stating its decision.*

It is elemental due process that a party is entitled to notice of any decision directly affecting him. In harmony therewith the Selective Service regulations (32 C.F.R. 1625.4), when the decision is adverse to a registrant, provide:

> "When a registrant * * * files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified, or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, *by letter,* shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. * * *" (Italics supplied)

A Form 150 is in terms a written request for change in classification. Implicit in the above quoted portion of the Regulations is a directive to the local board to examine the evidence submitted to it and bearing on a registrant's change of status; otherwise it would be meaningless.

In the case at bar the board did one of two things—either it failed to consider the appellant's request for change of classification to that of conscientious objector, or it failed to find sufficient reason therein to warrant such change. If the first be the fact, then the board acted arbitrarily and deprived the registrant of a right. If the second alternative was the one pursued, then the board acted arbitrarily in not reopening and considering the alleged change of status, since there is nothing in the record to offset the statement alleged in the application for reclassification as a conscientious objector.

Whatever the board did, it erred. The record shows that on receiving the Form 150 it made a decision on *non sequitur* grounds and buried it in the file without ever notifying the appellant, not even by telephone or by spoken word or by so much as a postcard. It certainly sent no letter, as required by the Regulations. Is this compliance? Is this even within the spirit of the law and the regulations? Can it be said that by such action the appellant was not deprived of a right?

For lack of notice of the board decision, if there were anything derogatory in his file, or if the board considered it to be such, he "never had a chance to explain the same". *Chernekoff v. United States* (CA 9, 1955), 219 F. 2d 721, at 723.

A chain is no stronger than its weakest link. Failure to give notice by letter is complete failure to comply with the law and regulations. When this link breaks, the Selective Service chain from that point is broken, useless, void, and of no force and effect. *Kessler v. Strecker*

(1939), 307 U.S. 22, at 34, 83 L. Ed. 1082, 59 S. Ct. 694. "All the steps prescribed by statute, and by regulations having the force of law, shall be strictly taken before it can be held that a person has been lawfully inducted into the military service." *Ver Mehren v. Sirmyer* (CA 8, 1929), 36 F. 2d 876, at 881. "Failure to give the required notice was not a mere formal defect but deprived the registrant of a substantial right." *United States v. Fry* (CA 2, 1953), 203 F. 2d 638.

The prejudicial damage done to appellant is shown in that, if he had known of the decision before receiving the Order to Report for Induction he could have taken some action to protect himself. He could have done either or both of two things: (1) request a personal appearance before the local board (32 C.F.R. 1624.1 guarantees this), or, (2) appeal and set forth the grounds on which he believed the local board erred (32 C.F.R. 1626.12 grants this right). But while the appellant confidently was waiting for action on his Form 150 filed September 20, 1950, the local board disposed of it secretly September 26, 1950 and almost immediately on October 3, 1950 issued an induction order, thereby blocking any administrative remedy the appellant might have had. (32 C.F.R. 1625.2 (2)).

The question is whether a local board can circumvent the clear language of the statute and the regulations, thereby depriving a registrant of his rights to hearing and appeal. To state the question is to answer it. The failure to give notice is fatal.

C. *The local board erred in failing to take any affirmative action continuing the appellant in his earlier I-A classification or placing him in any other classification.*

Selective Service Regulations dealing with classification anew (32 C.F.R.) provide:

> "1625.11 *Classification Considered Anew When Reopened.*—When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.
>
> "1625.12 *Notice of Action When Classification Considered Anew.*—When the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter.
>
> "1625.13 *Right of Appeal Following Reopening of Classification.*—Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification."

For a long time it has been the policy of the Selective Service System that, when a local board gives to a registrant the special form for conscientious objectors and allows him to fill it out and file it after he has filed his classification questionnaire and where for the first

time he shows that he is a conscientious objector, this is considered to be a reopening of the case. This policy is indicated in *United States v. Packer* (CA 2, 1952), 200 F. 2d 540, reversed on other grounds in 346 U.S. 1.

Then came the decision in *United States v. Vincelli* (CA 2, 1954), 216 F. 2d 681, holding that 32 C.F.R. 1625.2 demanded an inquiry, and holding further that the official issuance of a Form 150 to a registrant was itself a reopening requiring a reclassification. The court said:

> "* * * This board, at least, began such a procedure when it sent the appellant the conscientious objector questionnaire. *That was itself a reopening,* * * * and the vote of the board, though in terms a denial of a reopening, was in effect the denial of a reclassification on the merits after a reopening for their consideration. Consequently Selective Service Regulation 1625.11, 32 C.F.R. Section 1625.11, was applicable and *the board was required to classify him again* 'in the same manner as if he had never before been classified'. This included 'the same right of appearance before the local board and the same right of appeal as in the case of an original classification'. Selective Service Regulation 1625.13, 32 C.F.R. Section 1625.13. These are substantial rights and the board's procedure in this instance by depriving the appellant of them, was a *denial of due process which made his I-A classification a nullity.* * * *" (Italics supplied)

The Ninth Circuit in the earlier case of *Knox v. United States* (CA 9, 1952), 200 F. 2d 398, sensed the injustice of failure to take any affirmative action after a Form 150 had been filed, when it said at page 401:

> "The significant disregard of the registrant's procedural rights in this instance lies in the fact that

upon his personal appearance after classification he presented for the first time evidentiary matter in support of his formal claim to the conscientious objector status embodied in his questionnaire, and *no action appears to have been taken to classify him in light either of this evidence or of the showing contained in Form 150, later submitted.* * * *

"Classification by the local board is an indispensable step in the process of induction. *The registrant is entitled to have his claim considered and acted upon by these local bodies.* * * *" (Italics supplied)

It follows that the appellant, when officially issued a Form 150 which he duly filed, was in law granted a reopening of his classification. The decision of the board, never communicated to the appellant, was in effect a denial of reclassification into I-O. This, in turn, called for a new and original classification into I-A together with the right to a personal appearance before the local board and a right of appeal. Having failed to take such affirmative action, the local board denied to the appellant due process of law which made his I-A classification a nullity.

D. *The local board erred, after reopening appellant's classification, in failing to make any entry on the back of the Form 100 of its decision.*

After reopening a classification, the Selective Service Regulations require a minute thereof on the back of the Classification Questionnaire (Form 100).

32 C.F.R. 1623.4 (d) and (e), provide as follows:

"(d) When the local board classifies or changes the classification of a registrant, it shall record such

classification on the Classification Questionnaire (SSS Form No. 100), the Classification Record (SSS Form No. 102), and in the space provided therefor on the face of the Cover Sheet (SSS Form No. 101).

"(e) When the Notice of Classification (SSS Form No. 110), is mailed, the date of mailing such notice shall be entered on the Classification Record (SSS Form No. 102) and on the Classification Questionnaire (SSS Form No. 100). * * *"

In the case at bar none of these things was done, thereby leaving the record in such improper shape as to deprive the appellant of a personal appearance and an appeal, when in fact the regulations confer them as a matter of right, and the Act of Congress specifically grants the right of appeal to conscientious objectors.

Very valuable rights were taken away from Stain when the board failed to notify him of its decision of September 26, 1950. The right to a personal appearance is a vital one; it is his last chance to appear in person before his judges and plead his cause. *Knox v. United States* (CA 9, 1952), 200 F. 2d 398. The deprivation of the right to a personal appearance has been held enough to invalidate a draft board order. *United States v. Romano* (S.D.N.Y., 1952), 103 F. Supp. 597; *United States v. Peterson* (N.D. Calif. S.D., 1944), 53 F. Supp. 760; *United States v. Laier* (N.D. Calif. S.D., 1943), 52 F. Supp. 392.

Furthermore, the local board so manipulated the appellant's file that he was denied a right of appeal,—a statutory right given by Congress especially to conscientious objectors. See Sec. 6 (j) of the Act. No regulation

or order is valid which deprives the appellant of this right intended for him by Congress.

It is respectfully submitted, therefore, that the local board deprived appellant of procedural due process of law when it refused to reopen his case and reclassify him upon the filing of the Special Form for Conscientious Objector. Moreover, the local board deprived the appellant of another right when it failed to notify him of its action in failing to reopen his case and reclassify him after the filing of the Special Form for Conscientious Objector, thereby precluding him from a right to a personal appearance before the local board and a right of appeal guaranteed by Act of Congress.

CONCLUSION

It is respectfully contended that the judgment of conviction in this case should be reversed, and the trial court should be directed to sustain the motion for judgment of acquittal and discharge the appellant.

Respectfully submitted,

G. Bernhard Fedde,
Counsel for Appellant.
Office and Post Office Address:
1108 S. E. Grand Avenue,
Portland 14, Oregon.

September 1955.